Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-677

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, Members of the South Dakota Cement Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Pages
Citation to Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions, Statutes and Rules Involved	3
Basis of Jurisdiction	3
Statement	4
Reasons for Granting the Writ	8
Conclusion	17
Appendix A—Opinion of the Eighth Circuit Court of Appeals Dated August 7, 1979, *Reeves, Inc. v. Kelley*, 603 F. 2d 736 (8th Cir. 1979)	App. 1
Appendix B—Memorandum Opinion of the United States Supreme Court, Dated May 14, 1979, *Reeves, Inc. v. Kelley*, — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979)	App. 6
Appendix C—Opinion of Eighth Circuit Court of Appeals Dated November 7, 1978, 586 F. 2d 1230 (8th Cir. 1978)	App. 7
Appendix D—Restraining Order of United States District Court Dated July 21, 1978	App. 14
Appendix E—Minutes of South Dakota Cement Commission, June 1, 1978	App. 17

TABLE OF CONTENTS—Continued

Pages

Appendix F—Partial Minutes of South Dakota Cement Commission, June 26, 1974, p. 5 ..... App. 21

Appendix G—Relevant Constitutional Provisions, Federal Statutes, Rules and Regulations ..... App. 22

Appendix H—Relevant Constitutional and Statutory Provisions of the State of South Dakota App. 26

AUTHORITIES CITED

CASES:

Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 527, 55 S. Ct. 497, 79 L. Ed. 1032 (1935) 10

City of Philadelphia v. New Jersey, 437 U. S. 617, 98 S. Ct. 2531, 47 L. Ed. 2d 475 (1978) 15

Di Santo v. Pennsylvania, 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 524 (1927) 13

Foster-Fountain Packing Company v. Haydel, 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928) 10, 13

Gibbons v. Ogden, 9 Wheaton 1, 6 L. Ed. 23 (1824) 9

H. P. Hood & Sons v. Du Mond, 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949) 9, 15, 16

Hughes v. Alexandria Scrap Corporation, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976) 7, 12, 13, 16

Hughes v. Oklahoma, 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979) 7, 8, 9, 10, 14, 16

AUTHORITIES CITED—Continued

Pages

Johnson v. Haydel, 278 U. S. 16, 49 S. Ct. 6, 73 L. Ed. 155 (1928) 13

Pennsylvania v. West Virginia, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1922) 13

Pike v. Bruce Church, Inc., 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) 12, 15

Reeves, Inc. v. Kelley, 586 F. 2d 1230 (8th Cir. 1978), *cert. granted*, — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1091 (1979) 2, 7

Reeves, Inc. v. Kelley, 603 F. 2d 736 (8th Cir. 1979) 2, 7, 8, 12, 13

Toomer v. Witsell, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948) 10, 14

West v. Kansas Natural Gas Co., 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911) 13, 14

STATUTES:

15 U. S. C. § 1 15

28 U. S. C. § 1254 (1) 2

28 U. S. C. § 1331 3

28 U. S. C. § 1443 3

28 U. S. C. § 1651 (a) 3

South Dakota Compiled Laws 5-17-1 ..... 3, 9

South Dakota Compiled Laws 5-17-2 ..... 3, 4

AUTHORITIES CITED—Continued

Pages

South Dakota Compiled Laws 5-17-2.1 ..... 3, 4

South Dakota Compiled Laws 5-17-9 3

RULE:

Rule 65, Federal Rules of Civil Procedure 3

CONSTITUTIONAL AND REGULATORY PROVISIONS:

Constitution of South Dakota, Article XIII,, Section 10 3,4

Constitution of the United States of America, Article I, Section 8, Clause 3 ..... 3, 9

Minutes of South Dakota Cement Commission, June 1, 1978, p. 3 ..... 3, 5, 11

Minutes of South Dakota Cement Commission, June 26, 1974, p. 5 ..... 3, 5

In The

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REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, Members of the South Dakota Cement Commission,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Petitioner prays that Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered on August 7, 1979.

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CITATION TO OPINIONS BELOW

The United States District Court for the Western Division of the District of South Dakota entered a Re-

straining Order dated July 21, 1978, granting petitioner's Request for Injunctive Relief. This Restraining Order is unreported and is printed in Appendix "D" hereto. The opinion of the United States Court of Appeals for the Eighth Circuit, dated November 7, 1978, is printed in Appendix "C" hereto and is reported as *Reeves, Inc. v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978).[1] The memorandum opinion of the United States Supreme Court, dated May 14, 1979, is printed in Appendix "B" hereto and is reported as *Reeves, Inc. v. Kelley,* — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979). The opinion of the United States Court of Appeals for the Eighth Circuit, dated August 7, 1979, is printed in Appendix "A" hereto and is reported as *Reeves, Inc. v. Kelley,* 603 F. 2d 736 (8th Cir. 1979).

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JURISDICTION

The Judgment of the Court of Appeals, printed in Appendix "A" hereto, was entered on August 7, 1979.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

—o—

QUESTION PRESENTED

1. Does the state of South Dakota, which owns and operates a cement plant, and which has for many years

1 This case was consolidated with two other cases on appeal to the U. S. Court of Appeals, Eighth Circuit. Only Reeves, Inc. petitioned for a Writ of Certiorari. See footnote 1 of *Reeves v. Kelley* (1978), *supra,* App. 9.

sold substantial amounts of its product in interstate commerce, violate the Commerce Clause of the United States Constitution by adopting a policy limiting the sale of its cement to South Dakota consumers first before making sales available to non-residents of the State of South Dakota?

—o—

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provision involved is the Commerce Clause of Article I, Section 8, Clause 3 of the Constitution of the United States of America. The statute giving the District Court power to issue the injunction is 28 U. S. C. § 1651 (a). The rules giving the District Court discretion to hear the injunction is Rule 65 of the Federal Rules of Civil Procedure. These provisions are printed in Appendix "G" hereto. Article III, Section 10 of the South Dakota Constitution and *South Dakota Compiled Laws* 5-17-1, 5-17-2, 5-17-2.1 and 5-17-9 are printed in their entirety in Appendix "H" hereto. The Minutes of the South Dakota Cement Commission dated June 1, 1978, are printed in Appendix "E" hereto. The partial Minutes of the South Dakota Cement Commission, dated June 26, 1974, are printed in Appendix "F" hereto.

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BASIS OF JURISDICTION

Jurisdiction of the United States District Court for the District of South Dakota was conferred by 28 U. S. C., § 1331, and 28 U. S. C., § 1443.

STATEMENT

Petitioner is a corporation organized and existing under the laws of the State of Wyoming, with its principal place of business at Buffalo, Wyoming. Petitioner is engaged in the sale of concrete and concrete products and conducts its business in a three-county area located in Sheridan, Johnson and Campbell Counties, Wyoming. Petitioner supplies approximately 54% of the consumers who purchase concrete within its market area. Petitioner receives 100% of its cement, a necessary ingredient in the production of concrete, from outside the State of Wyoming.

Respondents are members of the South Dakota Cement Commission, appointed pursuant to *South Dakota Compiled Laws* 5-17-2 (App. 26-27) to administer and control the South Dakota cement plant at Rapid City. Constitutional authorization for the operation of said plant is conferred by Article XIII, Section 10 of the Constitution of South Dakota (App. 26). The South Dakota Cement Commission and the state cement plant under its control are a principal department of state government. *South Dakota Compiled Laws* 5-17-2.1 (App. 27).

For the last twenty (20) years, since its inception in 1958, petitioner has received 95% of its cement from the South Dakota Cement Commission in Rapid City, South Dakota. Since January 1, 1975, petitioner has purchased from the South Dakota cement plant the following dollar volumes:

1975		$ 871,000.00
1976		824,000.00
1977		1,172,000.00
1978	(to June 30, 1978)	235,000.00

The South Dakota Cement Commission has engaged in interstate commerce. Since the establishment of the state cement plant more than fifty years ago, cement has been manufactured and sold to both consumers residing in the State of South Dakota and consumers residing outside the state of South Dakota. It is the only cement mill in the state of South Dakota. The market area for the sale of cement by the South Dakota Cement Commission to its consumers included the following states in addition to the State of South Dakota: North Dakota, Minnesota, Nebraska, Iowa, Montana, Colorado and Wyoming.

On June 1, 1978, the respondents, acting under color of state law, took the following action:[2]

> "The Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come first serve basis." Minutes of South Dakota Cement Plant, June 1, 1978, p. 3. (App. "E")

When the foregoing policy was instituted there was a serious cement shortage being experienced both nationally and in the South Dakota region. Shortages of cement were caused by a dramatic increase in demand usage in the regular marketing area of the South Dakota cement plant. The sharp increase in demand was also the cause of shortages at neighboring cement manufacturers and in other regions of the United States.

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2 Apparently the policy was first expressed at a meeting of the South Dakota Cement Commission at the state cement plant held on June 26, 1974 (See App. 21). However, management did not enforce the policy until after it was "reaffirmed" on June 1, 1978.

On July 5, 1978, the petitioner dispatched a cement truck from Wyoming to the South Dakota cement plant in Rapid City, South Dakota, and requested that the truck be loaded with cement. The driver of the petitioner's truck was informed that the truck could not be loaded for the reason that petitioner is located and does business outside the State of South Dakota. Petitioner was informed by officials of the respondents that it could not purchase cement at the South Dakota cement plant until all the demands for cement by residents of the state of South Dakota had been met. Because of a continuous cement shortage, the South Dakota Cement Commission refused to sell cement to petitioner.

On July 19, 1978, a civil suit was initiated by petitioner by filing a Complaint in the United States District Court for the District of South Dakota, Western Division. On the same date the petitioner filed a motion for a temporary restraining order and preliminary injunction. On July 21, 1978, the Honorable Andrew W. Bogue entered a restraining order prohibiting the respondents from refusing to serve the petitioner simply because the petitioner was not an entity located within the boundaries of the state of South Dakota and declaring the policy adopted by the respondents a violation of the Commerce Clause and Privileges and Immunities Clause of the United States Constitution. On August 1, 1978, respondents filed their Notice of Appeal (from the restraining order entered July 21, 1978) to the United States Court of Appeals for the Eighth Circuit.

On appeal, the United States Court of Appeals, Eighth Circuit, remanded the cause to the District Court with directions to vacate the injunction granted to the petitioner and to dismiss the Complaint for failure to state a claim for relief. Not applying the Privileges and Immunities Clause, the United States Court of Appeals, Eighth Circuit, concluded that the Commerce Clause does not limit South Dakota's power "to choose whether, to whom, and on what conditions to sell its goods." *Reeves, Inc. v. Kelley,* 586 F. 2d 1230, 1232 (8th Cir. 1978). Such activity was not considered by the Court of Appeals as the type of activity that the Commerce Clause was enacted and intended to prevent. On November 16, 1978, Andrew W. Bogue, United States District Judge, vacated the injunction issued by the District Court on July 21, 1978, and ordered the action dismissed.

On January 31, 1979, Reeves, Inc. filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in the Supreme Court of the United States. On May 14, 1979, the Petition for a Writ of Certiorari was granted and the Judgment of the United States Court of Appeals for the Eighth Circuit was vacated and the case remanded for further consideration in light of *Hughes v. Oklahoma,* 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). *Reeves, Inc. v. Kelley,* — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979).

On remand, the United States Court of Appeals for the Eighth Circuit issued its opinion in which it refused to apply *Hughes v. Oklahoma, supra,* and continued to abide "by our previous holding that the Commerce Clause does not prohibit South Dakota 'from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp.,* 426 U. S. at 810." *Reeves, Inc. v. Kelley,* 603 F. 2d 736 (8th Cir. 1979). The U. S. Court of Appeals distinguished *Hughes*

v. Oklahoma, supra, on the basis that South Dakota had not "attempted" to prevent articles of trade reduced to possession and ownership by private individuals from being shipped and sold in interstate commerce.

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REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it presents far-reaching constitutional issues not previously addressed by this Court concerning the application of the Commerce Clause of the Constitution of the United States to state-owned and state-operated commercial facilities. If the decision below is not a case of first impression before this Court, it is submitted that it is not in accord with previous decisions of this Court in applying the Commerce Clause of the United States Constitution. In either event, this Court should grant review.

A petition for a Writ of Certiorari to a Judgment of the United States Court of Appeals for the Eighth Circuit entered on November 7, 1978, was previously granted in this case by the United States Supreme Court on May 14, 1979, in favor of this petitioner. *Reeves, Inc. v. Kelley,* — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979). After remand, the United States Court of Appeals, Eighth Circuit, entered its judgment on August 7, 1979, reaffirming its earlier judgment of November 7, 1978. The same reasons which applied to granting of the Petition for a Writ of Certiorari of Reeves, Inc., to the November 7, 1978 Judgment of the United States Court of Appeals apply to the granting of this Petition, especially in light of the Court's decision in *Hughes v. Oklahoma,* 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979).

The respondents, members of the South Dakota Cement Commission, an agency of the State of South Dakota, have instituted a policy to prefer all South Dakota residents over out-of-state residents in sales of state-owned and state-produced cement. This action directly discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. The actions taken by the respondents, in preferring South Dakota citizens to all others, under the guise of state law, *South Dakota Compiled Laws,* 5-17-1, is an exercise in economic protectionism plainly prohibited by established constitutional principles developed in a long line of decisions of this Court extending from *Gibbons v. Ogden,* 9 Wheaton 1, 6 L. Ed. 23 (1824) to *Hughes v. Oklahoma, supra.*

The guiding principle that ". . . the State may not promote its own economic advantages by curtailment or burdening of interstate commerce . . ." is one ". . . deeply rooted in both our history and our law." *H. P. Hood & Sons v. Du Mond,* 336 U. S. 525, 532-533, 69 S. Ct. 657, 662, 93 L. Ed. 865 (1949).

The Commerce Clause crystallized the necessity of centralized regulations among the states so ". . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." See *H. P. Hood & Sons v. Du Mond, supra,* 336 U. S. at 539. This Court needs to clearly enunciate this principle as it applies to state-owned and state-produced commodities marketed in interstate commerce by the state.

The August 7, 1979 Judgment of the United States Court of Appeals upholding the actions of the respondents

fails to properly apply the established constitutional principles set forth in *Hughes v. Oklahoma, supra,* and the decisions supporting the *Hughes* case. The Court below distinguished the *Hughes v. Oklahoma* case by claiming that South Dakota neither "attempted" nor "sought" to regulate commerce in the sale of cement. Not only are these conclusions not supported by the record but have little to do with the effect of the actions of the respondents.

The motive or intent of the respondents has little relation to the practical effect of their actions. Petitioner should not be bound by the state's intentions in regulating the sale of cement. See *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928); and *Toomer v. Witsell,* 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). There was an express trade barrier imposed by the resolution adopted by respondents. Whether a state imposes burdens upon interstate commerce by placing restrictions on private individuals and businesses or places restrictions on its own governmental agencies, the effect is the same. The state cannot escape the power of the Commerce Clause by changing the form in which it imposes direct burdens upon interstate commerce. See *Baldwin v. G. A. F. Seelig, Inc.,* 294 U. S. 527, 55 S. Ct. 497, 79 L. Ed. 1032 (1935). All of these concepts are reaffirmed in *Hughes v. Oklahoma, supra,* as this Court concentrated on the purpose and effect of the state action —not artificial and formalistic analysis of ownership and commerce.

The actions of the respondents and the subsequent effects could not be clearer. The western portion of the United States, which includes the State of South Dakota,

was facing a critical shortage of cement. South Dakota owned the only cement mill in South Dakota and served several surrounding states with cement. The South Dakota Cement Plant is governed by a commission, each member appointed by the Governor of South Dakota. After discussing the critical shortage of cement, the South Dakota Cement Commission adopted the following policy at its June 1, 1978, meeting:

> ". . . the Commission re-affirmed its policy of supplying all South Dakota customers first and honor all contract commitments, with the remaining volume allocated on a first come, first serve basis." App. 20.

The United States Court of Appeals, Eighth Circuit, explains this policy as follows:

> "We held that South Dakota was acting in a proprietary capacity in the sale of a product it manufactured and that as such it had the right, as any other entrepreneur, to sell to whomever it chose." 603 F. 2d at 737.

This approach to the question is simplistic and artificial. The policy adopted by the Commission is not simply a marketing decision. It was a decision of economic isolationism. It was not a decision based on sound business reasons or to preserve a valuable resource. It was a political decision. To compare the ability and right of state to be treated the same as a "private entrepreneur" is to ignore the practical realities of economic life. The functions of a state, exercisable through its police powers, are much different from the operations of private industry, even if the function of the state is "proprietary" in nature.

The restrictions on sales of cement imposed by the respondents had nothing to do with the health and safety

of the citizens of South Dakota, and did nothing to shelter the citizens of South Dakota from fraud. See *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The preference of sales to South Dakota residents was directed primarily to preserve the economic interests of South Dakota businesses which were experiencing a shortage of cement. The result to petitioner was immediate and direct. Its principal supply of cement was cut off.

The court below continued its heavy reliance on *Hughes v. Alexandria Scrap Corporation*, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976).[3] The United States Court of Appeals, Eighth Circuit states in its judgment of August 7, 1979:

> "South Dakota has not sought to *regulate* interstate commerce in the sale of cement. We conclude that its action is more similar to Maryland's preference for its residents in its entry into the automobile scrap processing market, upheld in *Hughes v. Alexandria Scrap Corp.*, than conduct at which the prohibitions of the Commerce Clause have historically been directed.

3 The United States Court of Appeals, Eighth Circuit, was not without its doubts in ruling in favor of the State of South Dakota. In Footnote 3 of *Reeves v. Kelley* (1979), *supra*, Lay, J. wrote:

> "We are confronted with no other decision where the state, acting in a proprietary capacity, is challenged in its marketing decisions under the Commerce Clause alone. We fully recognize that dictum in earlier decisions provides pause for reflection on whether the distinction we make is a proper one. (Citations omitted.)";

and,

> "If our distinction is incorrect, we think it better for the Supreme Court to make the pronouncement rather than this Court to furrow new ground." *Reeves v. Kelley*, 603 F. 2d at 738 (Footnote 3).

> "We therefore abide by our previous holding that the Commerce Clause does not prohibit South Dakota 'from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 810." *Reeves v. Kelley*, 603 F. 2d at 738-739.

This conclusionary analysis ignores traditional methods of judicial scrutiny entailing "a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce." *Di Santo v. Pennsylvania*, 273 U. S. 34, 44, 47 S. Ct. 267, 271, 71 L. Ed. 524 (1927) (Stone, J., dissenting). By classifying South Dakota's actions with Maryland's actions in *Hughes v. Alexandria Scrap Corp., supra*, the Court below suspends employment of concepts of national commerce distilled into well established constitutional principles by previous decisions. The categorization of state action which plainly burdens interstate commerce as not "the kind of action with which the Commerce Clause is concerned"[4] can lead to dangerous results.

This Court long ago recognized that a state could not hoard its natural resources for the sole use of its citizens where private industry has previously submitted the resources to the channels of interstate commerce. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1922); *Foster-Fountain Packing Company v. Haydel, supra; Johnson v. Haydel*, 278 U. S. 16, 49 S. Ct. 6, 73 L. Ed. 155 (1928);

4 *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 805, 96 S. Ct. at 2495.

and *Toomer v. Witsell, supra.* The South Dakota cement plant has a long history of transactions with out-of-state consumers and of promoting the sale of its product not only intrastate but interstate. It is submitted that the actions of the respondents are identical to those taken by states which have sought to impose embargoes upon natural resources which were produced and marketed within the state by private industry with the exception that the "resources" in this case are state-owned commodities sold by the state.

Hughes v. Oklahoma, supra, emphasizes that the *West* reasoning has emerged as the dominant approach to Commerce Clause challenges to state regulation of exports of natural resources. "And why may not the products of the field be brought within the principle." *West v. Kansas Natural Gas Co.,* 31 S. Ct. at 571. No distinction is advanced in the above-cited cases which indicate that a different result should be obtained whether the articles of commerce are natural resources or other important or valuable resources. Any state action which limits the movement of any resource to the confines of the state, whether state owned or whether owned by private industry, is prohibited when it burdens interstate commerce by preventing the out-of-state consumer from entering that state and being treated the same as the in-state consumer. How can the state be prohibited from regulating private enterprise in the course of interstate commerce and yet be allowed to directly discriminate and burden interstate commerce through its own products? Such economic isolationism condemned by previous cases as abhorrent to the Commerce Clause is impermissible under the Commerce Clause of the Constitution of the United

States despite the fact it is imposed by a state on its own products.

The action of the respondents is one of those clear examples referred to by the Court in *City of Philadelphia v. New Jersey,* 437 U. S. 617, 98 S. Ct. 2531, 47 L. Ed. 2d 475 (1978), in which a state undeniably stops the flow of commerce at the limits of its borders. Even if the restrictions imposed by the Cement Commission were found to be an indirect or incidental burden on interstate commerce and thus subject to the rule enunciated in *Pike v. Bruce Church, Inc., supra,* there is no valid justification for the imposition of the burden which would be overcome by its benefit to local interests. It has traditionally been recognized that such burdens upon interstate commerce, when such burdens are incidental, are legitimate only when the state seeks to protect its citizens by insuring their health or safety and by shielding them from fraud. See *H. P. Hood & Sons v. Du Mond,* 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949). *Pike v. Bruce Church, Inc., supra,* pointed out that the motives of the state must be directed towards the safety of its citizens. 397 U. S. at 143.

The United States Court of Appeals, Eighth Circuit, erred in assuming that private industry in a similar situation could refuse to sell to non-residents if it so chose. This right is not absolute. Private industry engaged in selling commodities in interstate commerce may select its own customers in a bona fide transaction only so long as it does not restrain trade, i. e., eliminate competitors. See Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. § 1 (originally enacted as Act of July 2, 1890, c. 647, 26 Stat. 209). State action designed to protect its citizens from outside competition would be prohibited by the Commerce

Clause. See *Hughes v. Oklahoma, supra.* What the South Dakota Cement Commission has done is to eliminate competition for the purchase of South Dakota cement by consumers in Wyoming, North Dakota, Minnesota, Nebraska, Iowa, Montana and Colorado.

By the standards set up in *Hughes v. Oklahoma, supra,* a decision by the State of South Dakota never to make cement available to out-of-state customers when the commodity could become an article of interstate commerce, is impermissible under the Commerce Clause. This principle does not force any individual, state or political subdivision to market its product in any other state. What it does allow is out-of-state residents to enter every marketplace in the United States and be treated the same as a citizen of the marketing state. This principle is not new. It was recognized and stated in *H. P. Hood & Sons v. Du Mond, supra,* that ". . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." 336 U. S., at 539. It is not a question of forcing South Dakota to enter markets it has not previously entered. It is a question of allowing out-of-state consumers to go to South Dakota, without restriction or preference for South Dakota customers, and deal in a free federal trade unit created and protected by the United States Constitution. Such action is vastly different than a state entering the market as purchaser under a subsidy program as in *Hughes v. Alexandria Scrap Corp., supra,* and favoring its residents.

The holding of the Court below permits the state of South Dakota to elude the purpose of the Commerce Clause by deciding an important constitutional question

not directly addressed in previous decisions of this Court. The results could be disastrous. The federal free trade unit protected by our constitution would become subordinate to the entry of states into commercial enterprises. To allow such an exception would erode the integrity of the Commerce Clause of the Constitution of the United States. This Court should now deal with the important constitutional question of whether respondents may restrict interstate commerce by discriminating against sales of state-owned and state-produced cement to non-residents of South Dakota and preferring sales and deliveries to those who live within the borders of South Dakota.

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CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court
for the District of South Dakota

Submitted: June 14, 1979
Filed: August 7, 1979

Before LAY, ROSS and McMILLIAN, Circuit Judges.
LAY, Circuit Judge.

The Supreme Court has remanded our decision, 586 F. 2d 1230 (8th Cir. 1978), for us to reconsider in light of

its recent opinion in *Hughes v. Oklahoma,* 99 S. Ct. 1727 (1979). Upon review, we discern significant differences between the cases which cause us to adhere to our earlier holding that the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution, is not violated by the State of South Dakota's policy of preferential sale of cement it manufactures to South Dakota residents.

In *Hughes v. Oklahoma* the Supreme Court overruled *Geer v. Connecticut,* 161 U. S. 519 (1896). The Court rejected the legal fiction that a state owns wild game as a representative of its citizens and the correlative theory that it could control not only the taking of game, but also its transportation out-of-state even after it was lawfully possessed by another, thereby preventing it from becoming an item of interstate commerce. 99 S. Ct. at 1731-33. Thus, the well established doctrine that a state may not discriminatorily regulate interstate commerce by giving its residents preferred access over out-of-state residents to local natural resources, *see, e. g., City of Philadelphia v. New Jersey,* 437 U. S. 617 (1978); *Pennsylvania v. West Virginia,* 262 U. S. 553 (1923); *West v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911), now applies as well to wild game.

Our original decision in *Reeves v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978), which upheld South Dakota's preference for in-state residents in its sale of cement, was not based on the rationale that the cement was a state controlled natural resource and therefore South Dakota could regulate or prohibit its trade in interstate commerce. *Reeves v. Kelley* presented the unusual situation in which the challenge was to a state, which as a manufacturer-seller faced with production demands it could not meet,

made an administrative decision to give priority to meeting the needs of its residents. As our opinion pointed out, there was no allegation that South Dakota regulated or restricted out-of-state sale of privately manufactured cement or exercised its police powers to suppress competition in the manufacture or sale of cement. We held that South Dakota was acting in a proprietary capacity in the sale of a product it manufactured and that as such it had the right, as any other entrepreneur, to sell to whomever it chose.[1] The issue remains whether the decision in *Hughes v. Oklahoma* affects our prior holding.

In both *Hughes v. Oklahoma* and *Geer v. Connecticut,* the state restricted out-of-state sale of wildlife reduced to possession and ownership by private individuals. In contrast South Dakota has not attempted "to prevent privately owned articles of trade from being shipped and sold in interstate commerce. . . ." *City of Philadelphia v. New Jersey,* 437 U. S. 617, 627 (1978), (quoting *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 10 (1928)). In entering the market and preferring residents in sales, South Dakota has not attempted to regulate commerce; it has not attempted to interfere with or usurp federal regu-

---

1 A state may freely purchase to meet its needs. Although not in the context of a Commerce Clause challenge, the Supreme Court has written:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

Perkins v. Lukens Steel, Co., 310 U. S. 113, 127 (1940). *See also American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.,* 409 U. S. 904 (1972).

latory power.[2] While out-of-state purchasers such as Reeves may feel the effect of a reduced supply of cement in the interstate market, the effect is the result of a major supplier's temporary marketing decision, not unlike the market force exerted by Maryland's purchasing policies in *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976).

South Dakota has not sought to *regulate* interstate commerce in the sale of cement. We conclude that its action is more similar to Maryland's preference for its residents in its entry into the automobile scrap processing market, upheld in *Hughes v. Alexandria Scrap Corp.*, than conduct at which the prohibitions of the Commerce Clause have historically been directed.[3]

---

2 The issue posed here is the constitutional restriction under the Commerce Clause on state action when Congress has been silent. A state engaging in business is subject to federal power to regulate commerce regardless of whether it acts in a proprietary or sovereign capacity, see *United States v. California*, 297 U. S. 175, 183-87 (1936), and may even be prohibited from selective marketing practices. *See Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 810 n. 19 (1976); *cf. Douglas v. Seacoast Products, Inc.*, 431 U. S. 265 (1977) (federal preemption of state fishing regulations). We hesitate to hold the Commerce Clause standing alone requires judicial scrutiny of a state's administrative marketing decisions to insure the least discriminatory alternative is chosen. *See* 80 Harv. L. Rev. 1357 (1967).

3 We recognize that Justices Brennan, White and Marshall are of the opinion that the type of state action does not influence application of Commerce Clause restrictions, *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 818 (Brennan, J., dissenting). We also recognize that *Hughes v. Alexandria Scrap Corp.* differs from *Reeves v. Kelley* in Maryland's use of market subsidies and its laudatory environmental goal. Nonetheless, *Hughes v. Alexandria Scrap Corp.* is the decision most analogous factually to the instant case, in which the state participates in the market place as a seller, and we therefore deem its analysis controlling. We are confronted

(Continued on the next page)

(Continued from previous page)

with no other decision where the state, acting in a proprietary capacity, is challenged in its marketing decisions under the Commerce Clause alone. We fully recognize that dictum in earlier decisions provides pause for reflection on whether the distinction we make is a proper one. *See Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 522 (1935) (" '[A] state may not in any form or under any guise, directly burden the prosecution of interstate business.' ") (quoting *International Textbook Co. v. Pigg*, 217 U. S. 91, 112 (1910)); *West v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911). In *West* the Court struck down a protectionist statute saying:

> The statute of Oklahoma recognizes [gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. . . . If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any States. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court.

Id. at 255-56.

Yet these and other relevant decisions involve, in one form or another, state regulation of commercial transactions, and are not apposite to the situation in which an administrative agency of a state, whose initial entry into the manufacture of cement was not made with a discriminatory motive, makes a self-serving marketing decision. If our distinction is incorrect, we think it better for the Supreme Court to make the pronouncement rather than for this court to furrow new ground.

We therefore abide by our previous holding that the Commerce Clause does not prohibit South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 810.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

IN THE SUPREME COURT OF THE
UNITED STATES

No. 78-1194

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, et al.,

Respondents.

ORDER

The petition for a writ of Certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Hughes v. Oklahoma*, 441 U. S. — (1979).

May 14, 1979.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 78-1578, 78-1720 and 78-1721

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1720

Mullinax Concrete Company, a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1721

Russell's Ready Mix, Inc., a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court
for the District of South Dakota.

Submitted: October 19, 1978

Filed: November 7, 1978

Before LAY, ROSS and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

In 1919 the State of South Dakota, as authorized by its constitution, created a cement commission by legislative charter to carry out the manufacture, distribution and sale of cement as "works of public necessity and importance." S. D. Const. art. XIII, § 10; S. D. Compiled Laws Ann. § 5-17-1,-2,-9. *See generally Eakin v. South Dakota State Cement Comm'n,* 44 S. D. 268, 183 N. W. 651 (1921). In the past the Commission has operated a cement plant and has sold its products to out of state customers as well as to South Dakota residents. In recent months the demand for cement has risen sharply. Therefore, on June 1, 1978, the Commission reaffirmed a policy of supplying all South Dakota customers first and honoring all contract commitments, with the remaining volume being allocated on a first come, first served basis. As a result of this policy and the continuing cement shortage, the Commission refused to sell to out of state customers. Reeves, Inc., a Wyoming corporation, challenged this policy in federal district court. The district court, the Honorable Andrew Bogue presiding, found that such policy violated the Commerce Clause of the United States Constitution, U. S. Const. art. I, § 8, cl. 3, and enjoined its application to Reeves, Inc. Subsequently, Mullinax Concrete Service Co., a Wyoming corporation, and Russell's Ready Mix, Inc., an Iowa corporation, brought suit seeking a permanent injunction of the policy.[1] The court granted the requested relief in each case and permanently enjoined the Commission from taking any action to prohibit the sale of cement to prospective out of state purchasers because of their nonresidency. The State Cement Commission has filed this appeal. We reverse and remand to the district court with directions to vacate the injunctions.

The federal district court in issuing injunctive relief held:

> The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege [sic] and Immunities Clause of the United States Constitution.

Reeves, Inc. v. Kelley, No. 78-5060, slip op. at 3 (D. S. D. July 21, 1978).

Judge Bogue concluded:

---

1 These suits were necessary since following the court's action in *Reeves, Inc. v. Kelley,* No. 78-5060 (D. S. D. July 21, 1978), the Commission adopted a "prioritization" policy, whereby all customers, resident or nonresident, were allowed to purchase an amount equal to 50 per cent of the average amount they had purchased over the last three years. Implementation of that policy or of any other policy requiring out of state sales before the needs of South Dakota customers were met, except as to Reeves, Inc., however, was enjoined by a South Dakota circuit court as violative of the South Dakota Constitution and laws. The Commission obeyed, thus giving rise to *Russell's Ready Mix, Inc. v. Kelley,* No. 78-5073 (D. S. D. Sept. 22, 1978), and *Mullinax Concrete Service Co. v. Kelley,* No. 78-5074 (D. S. D. Sept. 22, 1978). Those cases were consolidated with *Reeves, Inc.* for argument and decision on appeal.

> A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.
>
> This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege [sic] and Immunities Clause.

Id. at 1-2.

The commerce clause[2] has been interpreted as primarily intended to inhibit the power of the states to interfere with the natural functioning of the interstate market through burdensome regulation or prohibition. *See City of Philadelphia v. New Jersey*, 98 S. Ct. 2531, 2535-37 (1978);[3] *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794,

2 We discuss application of the commerce clause only. The plaintiffs are all corporations, and corporations are not citizens within the meaning of the privileges and immunities clause, U. S. Const. art. IV, § 2, cl. 1. *Asbury Hosp. v. Cass County*, 326 U. S. 207, 210-11 (1945); *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 177 (1868).

3 In *City of Philadelphia v. New Jersey*, a decision relied upon by the plaintiffs, the Court struck down a New Jersey statute which prohibited importation of solid or liquid waste collected outside of New Jersey. The case stands for the principle that a state may not prevent shipment of privately owned articles of trade in interstate commerce on the ground of local need or command. *See also Pennsylvania v. West Virginia*, 262 U. S. 553 (1923); *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911). The Court specifically observed in *City of Philadelphia*, however:

> We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources. . . .

98 S. Ct. at 2537 n. 6.

806 (1976). In the instant case South Dakota has not attempted to pass any regulation or prohibition on any private industry functioning in commerce. It has simply acted in a proprietary capacity as a seller of cement within the interstate cement market. Such activity is not the type of state action the commerce clause was intended to restrict.

In *Hughes v. Alexandria Scrap Corp.*, the State of Maryland in an attempt to rid the landscape of junk cars paid a "bounty" to scrap processors for the destruction of inoperable automobiles over eight years old. An out of state processor was required to show title documentation in order to receive the bounty, whereas an in state processor was not. The result was a reduction in the bounties secured by out of state processors from the State of Maryland. A three judge district court concluded that the act constituted an impermissible burden on interstate commerce. The Supreme Court reversed, holding that the State of Maryland did not prohibit or regulate commerce but merely entered the market as a purchaser. In so holding the court said:

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

426 U. S. at 810.[4]

4 The fact that Maryland was a purchaser and South Dakota a seller is not a significant difference between *Hughes* and this case, since regulation of interstate products going either into or out of a state may offend the commerce clause. *Hughes v. Alexandria Scrap Corp., supra*, 426 U. S. at 808 n. 17.

The State of South Dakota, in carrying out this proprietary activity possesses the rights of and is subject to the regulatory restrictions on any private business making marketing decisions. *See National League of Cities v. Usery,* 426 U.S. 833, 854 n. 18 (1976); *United States v. California,* 297 U.S. 175 (1936). If a private industry had chosen to market the cement, it would be difficult to argue that the United States Constitution would compel it to sell to nonresidents if it did not so choose. We fail to see that the State of South Dakota must be treated any differently, simply because it is a public body rather than a private industry. The mere fact that it at one time sold cement to out of state entities does not place greater restrictions on its business dealings. South Dakota could have chosen never to make its cement available to out of state customers, and the constitutional question, had it arisen, would not be analytically different from that presented by its recent decision to prefer its residents. *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 809, 817 (Stevens, J., concurring). Nothing in this range of possible marketing decisions affects the initial question whether the commerce clause limits South Dakota's power to choose whether, to whom, and on what conditions to sell its goods. We hold that the commerce clause does not.

While a state is similar to private business when it participates in the market in a purely proprietary capacity, it is also somewhat different. As a government providing a public service and utilizing the money and resources of its residents, it has a right and perhaps even an obligation to consider their common good and conserve their resources so long as it does not do so by attempting to regulate or control commerce among the

states. *Toomer v. Witsell,* 334 U.S. 385, 409 (1948) (Frankfurter, J., concurring). The factual background in these cases does not indicate that South Dakota has attempted to control channels of interstate commerce. Accordingly, we hold the commerce clause does not prohibit the State of South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 810. *Cf. American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.,* 409 U.S. 904 (1972) (upholding the validity of state printing statutes which required all public printing of the state to be done in the state).

The causes are remanded with directions to the district court to vacate the injunctive relief issued and to dismiss the respective complaints in each case for failure to state a claim for relief.

It is so ordered.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX "D"

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV78-5060

REEVES, INC.,

Plaintiff,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Defendants.

RESTRAINING ORDER

(Filed July 21, 1978)

Plaintiff made application to this Court for a Temporary Restraining Order, Preliminary Injunction, and a Permanent Injunction, directing the State Cement Plant to abandon its present policy of selling cement only to residents of the State of South Dakota. The Court having heard the arguments presented by counsel at a hearing held July 19, 1978, and after reviewing the memorandums and cases submitted, as well as the law with respect to injunctive relief; the Court finds:

(1) There is a threat of irreparable harm to the Plaintiff if an injunction is not granted;

(2) The balance of said harm to the Plaintiff outweighs any harm to the Defendants; and

(3) The public interest of the entire region (South Dakota, Nebraska, Wyoming, North Dakota, Minnesota, Iowa) will be best served by issuance of this Restraining Order.

Both the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution were intended to protect commercial and personal intercourse from invidious restraints, to prevent interference through conflicting hostile state laws or policies. In the matter of interstate commerce we are a single nation—one and the same people. All the states are bound by these clauses and protected by them. A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.

This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege and Immunities Clause.

The Court is aware of the interest and desires of the Defendants to satisfy both the residents of South Dakota and the out-of-state residents. It realizes that the Defendants are cognizant of the fact that non-residents have, in the past, been loyal users of South Dakota cement, to the financial benefit of South Dakota. The South Dakota

ment Plant, however, cannot refuse to sell cement to Reeves Construction Company simply because it is not an entity within the boundaries of South Dakota. If a state, in this union, were allowed to hoard its commodities or resources for the use of their own residents only, a drastic situation might evolve. For example, Pennsylvania or Wyoming might keep their coal, the northwest its timber, and the mining states their minerals. The result being that embargo may be retaliated by embargo and commerce would be halted at state lines.

Because of the fact that the Defendants in this case were given considerable notice of the hearing on the legal issues contained herein and did appear in opposition to the Plaintiff's applications for Temporary Restraining Order, Preliminary and Permanent Injunctions, and because of the further fact that both sides have thoroughly briefed and argued the legal issues involved herein on the merits, and there being no substantial issue of a material fact, it is the ORDER of this Court that under 65a (2) of the Federal Rules of Civil Procedure, the hearing referred to will be a consolidated final hearing with preliminary injunction hearing, upon all legal issues contained in this case. This injunction will be considered as dispositive of all legal issues raised in this case.

The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution. It is therefore

ORDERED that the South Dakota Cement Commission is restrained from using such policy as related to the Plaintiff herein.

Dated this 21st day of July, 1978.

By the Court:

Andrew W. Bogue
United States District Judge

Attest:

William J. Srstka, Clerk
By Betty B. Berry, Deputy

APPENDIX "E"

MINUTES
SOUTH DAKOTA CEMENT PLANT
JUNE 1, 1978

A regular meeting of the members of the South Dakita Cement Commission was held at Pierre, South Dakota, June 1, 1978 with the following Commission members being present: Tom Kelley, Chairman; Stan Frank, Vice Chairman; John E. Phelps, Secretary-treasurer, Al Sandvig and Dave Johnson.

Also present were William P. Scanlon, President and General Manager; Joseph J. Ziegler, Vice President of Administration, and Mr. Fred Winkler for Plant Counsel, Donald R. Schultz.

The minutes of the resgular meeting of May 18, 1978 were read and approved as written. The Commissioners' per diem allowance for the month of May were reviewed for payment.

The disbursement record and the status of funds invested by the State Investment Officer for the month of May were reviewed and upon motion duly made, seconded and unanimously carried, the Commission approved the same as presented.

The amount of funds necessary to transact business at the Plant for the next thirty-one day (31) period was reviewed and upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

Pursuant to the provisions of Chapter 5-17 of SDCL (1967) IT IS HEREBY RESOLVED: By the South Dakota Cement Commission that its Secretary-treasurer be, and he is authorized and instructed to make a requisition and file the same with the State Auditor for a sum not to exceed Two Million and no/100 Dollars ($2,000,000.00) which is the estimated amount necessary for the transaction of business for the thirty-one day period beginning July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 2 of 3

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

WHEREAS, The provisions of South Dakota Compiled Laws (SDCL) 5-17-2 requires the Commission to annually choose from its membership a chairman,

vice-chairman and secretary-treasurer; therefore

BE IT RESOLVED That the South Dakota Cement Commission has unanimously nominated and elected Mr. Tom Kelley as chairman, Mr. Stan Frank as vice-chairman and Mr. John E. Phelps as secretary-treasurer; and

BE IT FURTHER RESOLVED That said appointments be effective for the ensuing fiscal year commencing July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 3 of 3

Attorney Fred Winkler reviewed with the Commission the notice of hearing to pass, amend and repeal the Plant's retirement rules pursuant to the provisions of SDCL 1-21 and SDCL 5-17-5. Because of the statutory timetables to be adhered to and the requirements of the fiscal note, the Commission authorized management to publish the notice of hearing as soon as practical in accordance with the statutory provisions.

President Scanlon reported to the Commission on the matter of the serious cement shortage being experienced at the plant and throughout the country. This shortage is due to a dramatic increase in cement usage in the regular marketing area, the shortage of supply by all neighboring cement manufacturers and nationally, and the plant's inability to place number six kiln on line as originally planned. Mr. Scanlon also stated that various attempts have been made to procure cement from other cement plants without success. The Commission discussed the Plant's major contract commitments requiring approxi-

mately 218,000 tons of cement for 1978 for paving projects only. After discussing all these matters at considerable length, the Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis. The Commission also instructed management to continue its efforts in procuring additional cement to aid in meeting current demands. Because of the serious cement shortage, President Scanlon was requested to stay in close communication with the Commission on all matters of significant nature.

Chairman Kelley reported to the Commission that the Chicago North Western Railroad line between Rapid City and Pierre is currently slated for extensive repair and replacement.

President Scanlon reported to the Commission on the following items: Plant equipment acquisitions and the status of Plant fuel and power contracts.

The Commission then discussed the annual plant picnic and tentatively set the date for July 16, 1978 with an alternative date of July 23 in the event of inclement weather.

There being no further business to conduct, upon motion duly made, seconded and unanimously carried, the meeting was adjourned until the next regular meeting tentatively scheduled to be held in Rapid City, South Dakota on July 11, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

APPENDIX "F"

Commission Meeting, June 26, 1974 Page 5

The Commission expressed its desire that South Dakota customers and South Dakota contracts be given preference in compliance with the constitution and statutes of this State and that the customers of the Plant be assured that the Plant will make all efforts to fulfill its commitments. President Scanlon announced that the Plant was operating at 98.4% of capacity.

On motion duly made and seconded and carried unanimously, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

There being no further business to come before the meeting, upon motion duly made, the meeting was adjourned with the Commission's expression to the Honorable Richard F. Kneip, Governor of the State of South Dakota for his attendance and advice.

/s/ Tom Kelley, Chairman

/s/ Donald R. Schultz,
Secretary-Treasurer

APPENDIX "G"

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

The Constitution of the United States of America, Article I, Section 8, Clause 3 provides:

> "Section 8. The Congress shall have the Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

28 U. S. C., § 1254 (1), provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U. S. C., § 1331, provides:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff, and, in addition, may impose costs on the plaintiff."

28 U. S. C., § 1443, states:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

28 U. S. C., § 1651 (a), states:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the useages and principles of law."

Federal Rules of Civil Procedure, Rule 65, states:

> "*Rule 65. Injunctions.*
>
> (a) PRELIMINARY INJUNCTION.
>
> (1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.
>
> (2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be inadmissible upon the trial on the merits becomes a part of the record on the trial and need

not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied to save the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may

prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) EMPLOYER AND EMPLOYEE; INTERPLEADER; CONSTITUTIONAL CASES. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, USC, § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, USC, § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

APPENDIX "H"

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE STATE OF SOUTH DAKOTA

The South Dakota Constitution, Article XIII, Section 10, states:

> "The manufacture, distribution and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase or appropriation, all lands, easements, rights of way, tracts, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material, incident or necessary to carry the provisions of this section into effect: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made, except upon a vote of two-thirds of the members elected of each branch of the Legislature."

South Dakota Compiled Laws 5-17-1 states:

> "The people having adopted amendments to our state Constitution to the effect that the manufacture, distribution, and sale of cement and cement products are works of public necessity and importance in which the state may engage, it is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such governmental functions subject to regulation by the state."

South Dakota Compiled Laws 5-17-2 states:

> "There is hereby created a state cement commission. The commission shall consist of five (5) members to be appointed by the Governor for terms of five (5) years. No more than four (4) members may be

> members of the same political party. Any member appointed to fill a vacancy arising from other than the natural expiration of the term shall serve only for the unexpired term. The commission shall annually choose from its membership a chairman, vice-chairman, and secretary-treasurer. No member may be removed from office except for cause."

South Dakota Compiled Laws 5-17-2.1 states:

> "The state cement commission and the state cement plant under its control shall comprise a principal department of state government."

South Daokta Compiled Laws 5-17-9 states:

> "The state cement commission is hereby empowered and authorized to operate the South Dakota state cement plant located at Rapid City, South Dakota, to sell the products produced at said plant, to fix the price of such products and to determine the manner and methods of the terms under which such products shall be sold, to advertise such products to the public in such manner as the commission shall deem proper, and to do all things in the operation of such plant and the sale of its product as the commission may deem necessary or expedient to the successful operation of said plant."